case cited the court said "the defendant cannot complain of instructions that allowed the jury to find him guilty of a lower degree of homicide than he was really guilty of under the evidence, if guilty at all." It would seem that the rule which confines the instruction strictly to the evidence is the better, for an instruction in regard to a lower degree of crime, when not warranted by the evidence, would operate as an inducement to sentimental jurors to convict of one of those grades when they should convict the accused of the higher or acquit him altogether.

TRUSTS—GRAIN COMPANY HELD TRUSTEE OF PROCEEDS FROM SALE OF MORTGAGED GRAIN DELIVERED TO IT.—Grain was delivered to D, a grain company, by one who had previously mortgaged it to P. P notified D of its mortgage and directed it not to sell the grain nor pay the mortgagor for it. But D later sold the grain, retaining the proceeds of the sale. The mortgagor later became bankrupt and the referee in bankruptcy obtained a court order requiring D to pay over to him these funds as the property of the mortgagor. In a suit by P it was *held* that D had become a trustee of the funds for P and as such was liable to P for the loss, for if it had disclosed the fact that it was a trustee it would have defeated the attachment by the referee in bankruptcy. *Bank of Brookings* v. *Aurora Grain Co. et al.* (S. D., 1922), 186 N. W. 563.

In a prior hearing in the same court, 43 S. D. 591, 181 N. W. 909, it had been held that the grain company was a gratuitous bailee, not a trustee, and consequently not liable because it could not question the legality of the process by which the grain was taken from it. The basis of this holding was that the mortgagee had consented to the sale by the grain company, so the latter had done nothing wrongful. There was consequently nothing on which to base an involuntary trusteeship. Two justices dissented, and on the rehearing, here noted, their opinion was adopted by the majority of the court as being 'in all things correct." This opinion seems to be based on the premise that the sale by the grain company was not with the consent of the mortgagee. If the sale was made in violation of the mortgagee's rights it was a conversion; if in recognition of them, the grain company voluntarily became a trustee of the proceeds for the mortgagee. It would, perhaps, have been clearer simply to call it a case of constructive trust based on conversion. See BOGERT, TRUSTS, § 37. The holding seems sound, although trust principles are applied to a somewhat unusual case.

UNFAIR COMPETITION—FURNISHING MEANS TO RETAILER.—Complainant made a liquid preparation of quinine with the bitter taste disguised, and colored and flavored by chocolate. Through salesmen it was submitted to physicians, who came to prescribe it and their prescriptions were filled by pharmacists to whom it was sold by the complainant. Later the defendant began to make the same preparation, as it had the right to do, and though it did not sell the preparation as the complainant's it carefully selected a chocolate which gave it the same flavor and color. By representing that it could be used in filling prescriptions for the complainant's "coco-quinine"

and by selling it at a lower price, it induced pharmacists to buy and use it for that purpose. *Held*, that by such conduct the defendant made itself a party to the deception of the ultimate purchaser, and was chargeable with unfair competition, and that to prevent such deception it should be enjoined from using chocolate in its preparation. *Eli Lilly & Co.* v. *Wm. R. Warner & Co.*, 275 Fed. 752.

The unfair competition is in the deceit of the ultimate purchaser. It is no defense that the retailer is not deceived. *Lever* v. *Goodwin* [1887], 36 Ch. Div. 1; *George G. Fox Co.* v. *Glynn*, 191 Mass. 344, 9 L. R. A. (n. s.) 1096. See also *Federal Trade Commission* v. *Winsted Hosiery Co.*, cited in the following note. The precise question presented by the principal case is whether injunctive relief may be had against the manufacturer when the actual fraud is committed by the retailer. That this relief may not be had when he is unconnected with the fraud except for supplying the instrument with which it was committed was accepted in the case of *Hostetter* v. *Fries*, 17 Fed. 620, and in *Royal Co.* v. *Royal*, 122 Fed. 337, it was suggested, but not decided, that if tricky retailers, knowing better, represent the defendant's articles as the goods of the complainant, it is probably not a matter for which the defendant is responsible. The court in the principal case was careful to state that the question was not whether the defendant was responsible for the fraud of the retailers, but whether, in counseling fraud and supplying an innocent means, it was itself guilty of fraud. Some courts have held that it is enough to show that the defendant made it possible for the retailer to sell the goods in such a way as to deceive the ultimate purchaser. *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154. For a collection of cases, see note to *George G. Fox Co.* v. *Glynn*, 9 L. R. A. (n. s.) 1096. The court's statement of the question in the principal case is due to the fact that federal courts adhere to the rule that a fraudulent intent is necessary in a case of unfair competition, and must be proved in order to claim the intervention of a court of equity. *Hires* v. *Villepuge*, 196 Fed. 890; *Elgin Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, 674. A contrary view prevails in England and a number of the state courts. *Singer Mfg. Co.* v. *Wilson* [1877], 3 App. Cas. 376; *Wirtz* v. *Eagle Bottling Co.*, 50 N. J. Eq. 164. In accord with the principal case, holding that relief will be granted against the manufacturer if shown that his purpose in selling the retailer was to defraud the public, are *Coco Cola Co.* v. *Gay Ola Co.*, 200 Fed. 720 (beverage); *Royal Co.* v. *Royal*, *supra* (name); *Lever* v. *Goodwin*, *supra* (wrapper).

UNFAIR COMPETITION—PROTECTION OF THE PUBLIC.—Defendant sold to retailers underwear branded as "gray wool," "natural wool," and the like. Much of it contained, in fact, only a small percentage of wool. The Federal Trade Commission ordered defendant to cease using so deceptive brands. *Held*, the order was within the power of the Commission and valid. *Fed. Trade Com.* v. *Winsted Hosiery Co.* (U. S. Sup. Ct., April 24, 1922).

The defense was that only the public were deceived; that retailers knew